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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 808

NATIONAL MARITIME UNION OF AMERICA, ET AL.,
Appellants,

vs.

PAUL M. HERZOG, ET AL.

REPLY TO STATEMENT OF MATTER MAKING AGAINST JURISDICTION OF THIS COURT

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(1) Appellees concede that the questions relating to the constitutionality of Section 9(h) of the Act are substantial in character and present issues of great public importance in the administration of the Act.

(2) Appellees argue that the questions relating to the constitutionality of Section 9(f) and (g) are not substantial in character. The reason advanced to support this position; *i.e.*, that all that is involved is application of the majority rule principle is frivolous. The principle of majority rule as set forth in *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 560, is in no way relevant. It is one thing to be deprived of bargaining status and an opportunity to function as a union because a majority of em-

ployees vote for one union or no union in preference to the contending union. It is another to be deprived of such status and opportunity as a result of a vote in which the contending union was not allowed to be on the ballot. "Majority rule" decides which of the alternatives voted on shall be binding. Obviously, it does not apply to an alternative not before the electorate and hence not voted on. The fact that the majority chooses course A as between a vote limited to courses A, B and C, carries no implication that the majority voted to foreclose course D.

The appellees contend and have always contended (see Statement of Jurisdiction pp. 8-9) that their constitutional rights are being denied by a statutory scheme which deprives the appellant trade union of its opportunity to function and in so doing abridges the right of its members to free speech and assembly. Thus the position of the appellants is quite distinct from that of a trade union, which, although participating in a ballot, fails to win a majority. The question of the employment of sanctions which operate to deny the right of a trade union to function is a substantial one, see *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459, and was certainly so regarded by all three members of the court below, as may be seen from their treatment of the subject.

(3)(a) The appellees contend that if 9(f) and (g) are held to be constitutional, appellants are not entitled to a review of the constitutionality of Section 9(h). This contention is a novel one and itself raises a question substantial in character. The substantial nature of the question appears clearly from the fact that the court below unanimously rejected this contention of the appellees. Although the court upheld 9(f) and (g), as constitutional, it nevertheless considered that it was required to pass upon the challenge to the constitutionality of 9(h). All three sections

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raise discrete constitutional issues. Certainly there is no reason why consideration of the constitutionality of 9(f) and (g) should require prior or more favored treatment than the constitutionality of Section 9(h). In any event, the question here posed by the appellees is substantial in character.

(b) A substantial question is raised as to the interpretation of the Declaratory Judgment Act, 28 U. S. C. § 400. The appellants challenge the constitutionality of three sections of the Act. Can the appellants be denied the right to a review of one section of the Act upon a holding that other sections are constitutional? This question has never before been passed upon by this Court.

(c) A court of equity has jurisdiction to grant relief upon conditions. *S. E. C.* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, 445. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177. Because of the concededly important public question raised in the challenge to constitutionality of Section 9(h), *Virginian Ry. Co.* v. *System Federation No. 40, supra*, the public interest may require this Court, if it determines that 9(f) and (g) are constitutional, to exercise its equity powers so as to grant conditional relief. This question is in itself a substantial one.

(4) The Court below passed upon a question conceded by all to be substantial in character; *i.e.*, the constitutionality of section 9(h) of the Act. This in itself is sufficient to establish the jurisdiction of the Court below and the jurisdiction of this Court on appeal, even if no other substantial question was raised or passed upon. *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255-256. The suggestion of the appellees can lead only to an anomalous result. If this Court refuses to note jurisdiction on the

basis advanced by appellees, it will in effect affirm without consideration a holding reached below on an entirely different question, one which the appellees admit to be substantial and which they concede requires consideration by this Court.

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